

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

NEXEO SOLUTIONS, LLC

and

Cases 13-CA-46694
13-CA-62072
20-CA-35519

TRUCK DRIVERS, OIL DRIVERS,
FILLING STATION AND PLATFORM
WORKERS' UNION, LOCAL NO. 705, AN
AFFILIATE OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

and

BROTHERHOOD OF TEAMSTERS AND
AUTO TRUCK DRIVERS, LOCAL NO. 70
OF ALAMEDA COUNTY, AFFILIATED
WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

*J. Edward Castillo, R. Jason Patterson, and
Richard J. McPalmer Esqs., for the General Counsel.
David A. Kadela and Adam C. Wit, Esqs.
(Littler Mendelson, P.C.), of Columbus, Ohio,
for the Respondent.
Thomas D. Allison and Jason McCaughy, Esqs.
(Allison, Slutsky & Kennedy, P.C.), of
Chicago, Illinois, for Charging Party Local 705.
David A. Rosenfeld, Esq.
(Wineberg, Roger, and Rosenfeld), of Alameda,
California, for Charging Party Local 70.*

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case presents a close issue of whether Nexeo Solutions, LLC (Nexeo) is a “perfectly clear” successor employer to Ashland, Inc (Ashland) under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). The synopsis is: On

November 5, 2010, Nexeo and Ashland entered into an agreement whereby Ashland agreed to sell its distribution centers to Nexeo; that deal closed on April 1, 2011 and Nexeo takes over. That agreement required Nexeo to offer employment to all Nexeo employees in the same position, same base wage rate, and benefits comparable in the aggregate to Ashland's. These details became well known. On February 17, 2011, Nexeo informs Ashland's union-represented employees of the details of their initial terms of employment with Nexeo. All the employees accept the offers and seamlessly transition from Ashland to Nexeo on April 1. Did Nexeo violate Section 8(a)(5) by unilaterally setting the initial employment terms on February 17 and implementing them on April 1?

Cases 13-CA-46694 and 13-CA62072 were tried in Chicago, Illinois, on April 2-4, 2012., the Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an affiliate of the International Brotherhood of Teamsters (Local 705) filed the charges in those cases on April 7 and August 3, 2011, respectively¹ and the General Counsel issued the consolidated complaint on November 30, 2011. That complaint as amended alleges that Nexeo, as a "perfectly clear" successor employer to Ashland, violated Section 8(a)(5) by unilaterally implementing changes in initial terms and conditions of employment of employees and by delaying giving Local 705 certain information that Local 705 had requested. Nexeo filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, that it is a successor (but denied that is a perfectly clear successor) to Ashland, Inc. (Ashland), labor organization status, agency and supervisory status, appropriate unit and that Local 705 is the 9(a) representative of that unit of employees. Nexeo admitted that it made some, but not all, of the changes in working conditions; it denies it made those changes without first bargaining with the Local 705. Finally, Nexeo denies that it unlawfully delayed giving information to Local 705.²

Case 20-CA-35519 was tried in San Francisco, California, on May 7 and 8, 2012. The Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, affiliated with the International Brotherhood of Teamsters (Local 70) filed the charge on April 11 and the complaint issued on November 30. That complaint as amended alleges that Nexeo violated Section 8(a)(5) by making certain changes in working conditions of employees on April 1 and making other changes on April 4. Nexeo filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charge, interstate commerce and jurisdiction, Local 70's labor organization status, appropriate unit, and Local 70's 9(a) status; Nexeo also admitted that it is a successor employer to Ashland. Nexeo denied it had made certain changes and admitted that it made others; it denied it had violated the Act.

¹ All dates are in 2011 unless otherwise indicated.

² The General Counsel sought injunctive relief under Sec. 10(j). On June 28, 2012, U.S. District Court Judge John W. Darrah denied the request.

On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Nexeo, Local 705, and Local 70, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Nexeo a corporation, has been engaged in the business of connecting producers and customers of chemicals, plastics, composites and environmental services; it has many facilities, including facilities in Willow Springs, Illinois, and Fairfield, California, where, based on a projection, it will annually purchase and receive at those facilities goods valued in excess of \$50,000 directly from outside those States. Nexeo admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 705 and Local 70 are each a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Purchase and Sale*

On November 5, 2010, Nexeo⁴ agreed to purchase certain assets from Ashland, including the distribution centers in Fairfield, California, and Willow Springs, Illinois, for nearly \$1 billion. Local 705 had represented a unit of employees⁵ at Ashland's distribution center in Willow Springs for about 20 years; at the time of the hearing there were about 32 employees in that unit. Local 70 had represented a unit of employees⁶ at Ashland's distribution center located in Fairmont for about 18 years; at the time of the hearing there were about 20 employees in this unit.

In the agreement of purchase and sale (APS) Nexeo promised as follows:

Section 7.5(b)(i): Continuation of Employment

³ The General Counsel's unopposed motion, dated June 26, 2012, to correct the record by substituting accurate versions of GC Exhs. 48, 51, and 52 is granted. The documents attached to that motion are received into evidence and replace those earlier entered into the record.

Likewise, Local 70's unopposed motion to correct the transcript is granted. L. 9 of p. 1030 of the transcript is corrected to read as follows "Q And prior to that meeting had you learned from any source that"

⁴ Its name at the time was TPG Accolade, LLC, but it later transitioned into Nexeo.

⁵ That unit is:

Drivers employed by Ashland at its facility located in Willow Springs, IL, but excluding all guards and supervisors as defined in the Act.

⁶ That unit is:

Warehouse leads, drivers, drivers/material handlers and material handlers employed by the Employer at its plant located at 2461 Crocker Circle and its leased warehouse space located at 2200 Huntington Road, Suite A in Fairfield, California; but excluding all other employees, including all sales personnel, office clerical employees, professional employees, technical employees, guards and supervisors, as defined in or under the National Labor Relations Act.

Where applicable Law does not provide for the transfer of employment of any Employee ... Buyer shall ... make offers of at-will ... employment ... to be effective as of the Closing ... to all such Employees.

5 Section 7.5(c): Offers of Employment.

Buyer shall ... make offers of at-will ... employment to the Employees ... at least thirty (30) days prior to the Closing Date (or such longer period as required by ... the terms of any Union Contract), with such employment to be effective as of the Closing ... Any such offer of employment shall be for a position that is comparable to the type of position
10 held by such Employee immediately prior to the Closing Date and shall be on terms and conditions sufficient to avoid statutory, contractual, common law or other severance obligations ...

15 Section 7.5(d): Continuation of Compensation and Benefits

For a period of eighteen (18) months after the Closing Date ... Buyer shall ... provide to each Transferred Employee (i) a base salary or wages no less favorable than those provided immediately prior to the Closing Date and (ii) other employee benefits, variable pay, incentive or bonus opportunities under plans, programs, and arrangements that are substantially comparable in the aggregate to those provided by Ashland ... as expected to
20 be in effect as of on January 1, 2011 ...

25 Section 7.5(f): Severance Obligations

Ashland and Buyer intend that the transactions contemplated by this Agreement shall not result in the severance of employment of any Employee prior to or upon the
25 consummation of the transaction contemplated hereby and that the Employees shall have continuous and uninterrupted employment immediately before and immediately after the Closing Date, and Ashland and Buyer shall comply with any requirements under existing law to ensure the same.

30 Section 7.5(n): Employee Consultations

Buyer ... shall fully comply with all of its ... obligations (however arising) to inform and consult with, and in respect of, the Employees of the Business, whether the obligation arises under a Union Contract or applicable law. To the extent such communications occur in writing, Buyer ... will provide a copy to Ashland at the time said
35 communications occur and will provide Ashland any written responses to said communications after the time they are received.

40 Section 7.5(o): Union Contracts

From and after the Closing, Buyer shall ... recognize any collective bargaining units representing the Transferred Employees that are recognized as of immediately prior to the Closing.

45 Section 11.7 Public Disclosure

No communication, release, or announcement to the public or to employees ... shall be issued or made by any party without the prior consent of the other party ... ; provided, however, that each of the parties may make internal announcements to their respective employees that are consistent with the parties' prior public disclosures concerning the Contemplated Transactions ...

A schedule attached to the APS listed the names of all the employees in each unit; Nexeo was obligated to retain those employees.

5 Ashland then announced the sale to the public and to its employees. It also provided its employees with details concerning their future employment with Nexeo in a manner consistent with the terms of the APS described above. For example, Ashland posted questions and answers about the sale that included the following:

10 Does [Nexeo] anticipate any layoffs as a result of the transaction?
Broadly speaking, [Nexeo's] intent is to retain Ashland's employees. Ashland Distribution people ... will continue to work from their current locations and perform similar roles and functions.

15 Will Ashland Distribution's current management team remain with the business?
Yes

20 Does [Nexeo] anticipate any changes to compensation and/or benefits?
Under the terms of the agreement, for at least 18 months following closing, [Nexeo] is required to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing; and other employee benefits that are comparable in the aggregate to compensation and benefits as of January 1, 2011.

25 Many other documents from Ashland that were shared with Nexeo made similar assurances to the future Nexeo employees. Those documents reveal that Nexeo made every effort consistent with the APS to retain the existing work forces as part of the transition from Ashland. On the other hand, however, the employees and the Unions were never misled into believing that their benefits would be *identical* as opposed to *comparable in the aggregate* to the ones they enjoyed at Ashland. Rather, the communications made clear that the benefits would be different and the
30 employees would be informed of them as soon as they were developed. Indeed, both Local 70 and Local 705 became aware of the terms of the APS as they related to worker retention and compensation issues; both accurately communicated to their members that Nexeo planned to retain all the employees under a benefit scheme that would be comparable in the aggregate.

35 During the hearing I sustained hearsay objections to statements made by Ashland managers concerning the sale during times at which it was clear that those managers were not yet agents of Nexeo. In its brief Local 705 asks me to reconsider those rulings. I deny that request. In particular, I do not consider for the truth of the matter asserted any conversations between Local 705 officials and Ashland managers concerning the consequences of the sale. In addition
40 to the hearsay nature of those conversations, Local 705 had a copy of the APS and knew of its content but thereafter seemed to repeatedly question Ashland managers in an effort to get them

to say something slightly different. In any event, as the General Counsel’s brief discloses in detail, the written communications made by Ashland concerning the sale closely track the communications made by Nexeo itself.⁷

On April 1 Nexeo and Ashland closed the deal and Nexeo began operating the facilities it had purchased. As explained below, Nexeo offered employment to all unit employees at both facilities involved in this case and operated those facilities largely with former Ashland managers and supervisors. Their employment continued essentially uninterrupted from Ashland to Nexeo.

B. Willow Springs, Illinois

The complaint alleges that on April 1 Nexeo violated Section 8(a)(5) by:

- No longer providing coverage of the unit employees under Local 705’s pension plan but instead placing them under Nexeo’s retirement plan.
- No longer covering employees under Local 705’s health and welfare fund but instead placing them in Nexeo’s health insurance plan.
- Eliminating the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked.
- Reducing employees’ vacation pay from 50 hours to 40 hours for each week of vacation taken.

The complaint also alleges that Nexeo violated Section 8(a)(5) by delaying giving Local 705 the following information:

- Summary plan description for Nexeo’s health insurance plan covering unit employees.
- Summary plan description for Nexeo’s 401(k) plan covering unit employees.
- Plan document for the 401(k) plan covering unit employees.

The unit employees had been covered by collective-bargaining agreements that provided for a multiemployer International Brotherhood of Teamsters Local 705 Pension Fund. Under that plan employees could collect \$2500 per month after 25 years of participation in the fund, regardless of age. The employees could continue to work after 25 years and thereby collect and additional \$100 per month for each additional year.

On February 15 Nexeo met with Local 705. Present at the meeting for Nexeo were John Hollinshead, labor relations consultant, and Brian Brockson, Nexeo’s vice president of operation and formerly Ashland’s logistics director. Neil Messino, contract administrator, Rick Rowe,

⁷ The General Counsel and Local 70 both would have like me to have continued with the hearing in the case. I denied the General Counsel request because the additional evidence he sought to offer was either covered by my hearsay rulings or was duplicative of information already in the large record in this case. Local 70 complains when I cut off its effort to prolong this case so it could go on a fishing expedition for subpoenaed documents. I affirm both rulings. As the General Counsel has admitted in various filings and on the record, both Ashland and Nexeo have turned over many bankers boxes of subpoenaed materials.

business agent, and Tom Allison, attorney, were present for Local 705. Hollinshead informed Local 705 that Nexeo intended to send offers of employment to all the employees in the next few days and that the offers would set initial terms of employment for those employees. Hollinshead explained the Nexeo had problems with Local 705's pension plan; he described that plan as having a withdrawal liability of about \$9 million. Local 705 disputed that assertion. Hollinshead said that Nexeo would place the employees in its 401(k) retirement plan instead of the Local 705 pension plan. Nexeo's plan, unlike the Local 705 plan, required employee contributions. Hollinshead pointed to a study that it had commissioned to compare the two plans. According to that study only 4 of the 32 unit employees would suffer as a result of the conversion; Hollinshead then explained that Nexeo would pay those four employees the amount money it thought represented the shortfall that would result from the change. Local 705 challenged that assertion, contending among other things that Nexeo only calculated the time the employees had spent with Ashland as opposed to the time each employee had been covered by the Local 705 plan and that Nexeo contemplated that the employees under its plan would invest the money and earn a 7.5 percent-annual rate of return as they continued to work until age 65. Hollinshead said that Nexeo also wanted the unit employees to be covered by Nexeo health plan instead of Local 705's plan, but that issue would not be a "deal breaker." Local 705 asked for Nexeo's summary plan documents for its 401(k) and health insurance plans, and Hollinshead agreed to provide them. Hollinshead gave Local 705 a copy of the letter it planned to send to the employees. Hollinshead said that Nexeo would recognize Local 705 as soon as a majority of employees had accepted the offer of employment. After a caucus, Local 705 indicated that it did not agree that Nexeo could make the changes in the terms and conditions of employment of the unit employees.

That same day Messino sent Hollinshead the following message:

I am following up our meeting today concerning Nexeo Solutions' purchase of Ashland Distribution. We appreciate the fact that Nexeo intends to retain all of the current bargaining unit employees and recognize Local 705 as their bargaining agent. As we advised you, Local 705, IBT, does not believe that Nexeo can unilaterally eliminate the employees' pension and health insurance plans, and we will take whatever action is necessary to support that position. In that regard, we told you that the employees' acceptance of employment from Nexeo is without prejudice to our position, and does not constitute a waiver by the Union or the employees of our position that these terms cannot be unilaterally changed. You stated that the Company understands that.

At the same time, we recognize that pensions and health insurance are mandatory bargaining subjects, and we are prepared to discuss a new contract with Nexeo, including Nexeo's desire to move these employees from the Local 705 pension plan into Nexeo defines contribution plans while making employees whole for whatever losses they suffer as a result of that move. We are prepared to begin these negotiations as soon as possible, in the hope that agreement on the new contract could be reached before the Company's current March 31, 2011, closing date.

In that connection, we have requested (1) summary plan description of the current health insurance plans, including retiree insurance, covering bargaining unit employees; (2) summary plan descriptions of the pension plans into which the Company wished to move bargaining unit employees; and (3) the Company's analyses of the impact on bargaining unit employees of their movement from the Local 705 plans into the Company's

proposed plans and the assumptions used by the Company in making these analyses. We need this information in order to bargain about the Company's proposals.

5 On February 17 Nexeo sent the offers of employment to the employees. The letters read as follows:

Re: Contingent Offer of Employment

Dear [Name]:

10 On behalf of Nexeo Solutions, LLC ("Nexeo Solutions"), it is my pleasure to extend the following offer of employment to you. This offer is contingent upon the successful closing of Nexeo Solutions' purchase of the assets of Ashland Distribution, your remaining employed by Ashland until the closing and your completing our new hire paperwork. It is made under the terms and conditions that follow.

15 Our goal is to make the transition as smooth as possible. Toward that end, if you accept this offer:

- Your employment with Nexeo Solutions will begin as soon as the sale closes;
- Your position will be the same as your position with Ashland immediately prior to closing;
- Your base rate of pay will be the same as your base rate of pay with Ashland immediately prior to closing;
- You will be eligible for employee benefits under plans and programs that are comparable in the aggregate to plans and programs sponsored by Ashland immediately prior to closing;
- You will be provided more detailed information on the steps that will be taken to enroll you in employee benefits prior to close; and
- Nexeo Solutions will credit your service with Ashland for benefit-related purposes, to the extent such service was recognized under comparable benefit plans and programs sponsored by Ashland.

25 Nexeo Solutions benefit plans are structured to be similar to those that Ashland provides generally to its employees. A summary of those plans is attached to this letter for your review.

30 Ashland employment policies will terminate when the sale closes. To the extent reasonably possible under our structure, Nexeo Solutions employment policies will generally mirror those policies. We are not, however, adopting any existing practices that are inconsistent with the express terms of our policies. If you wish to review the policies that we have prepared to date, you can obtain them by contacting the HR Service Center. Once an internal website is established, we will post our policies there.

35 We are aware that you have union representation as an employee of Ashland. As we discussed with your business agent earlier this week, before Nexeo Solutions can recognize the union as your representative, there is a technical legal requirement that has to be satisfied. The requirement is that a majority of our employees in the unit in which you work come from the current Ashland bargaining unit. Accordingly, once we know that a majority of employees from the Ashland bargaining unit has accepted our offer, we will be able to immediately recognize the union as your representative. Once recognition is secured, Nexeo Solutions will also be able to begin contract negotiations with the union.

40 In extending this offer to you, we think you should know that Nexeo Solutions has not agreed to assume any of Ashland's collective bargaining agreements. We have also

chosen not to adopt, as initial terms and conditions of employment, any of the provisions contained in any current or expired collective bargaining agreement to which Ashland is a party. Among other things, what that means is that if you accept this offer, you will not, when you become a Nexeo Solutions employee, participate in either the multi-employer pension plan or the multi-employer health and welfare plan in which you participate as an Ashland employee. Instead, you will be covered at the outset of your employment by Nexeo Solutions' 401 (k) and group health plans.

To accept this offer, it is necessary for you to sign the original copy of this letter and return it to us in the enclosed envelope. While it is our hope that you respond as soon as possible, we will hold this offer open to you for 10 days from the date of this letter.

We hope that you and all of your coworkers accept our offer of employment. We look forward to your bringing your skills and experience to our team, and beginning what we hope will be a long and rewarding relationship.

Very truly yours,

David Bradley
CEO Nexeo Solutions, LLC

I accept this contingent offer of employment under the terms and conditions set forth above.

Signature

Date

Attached was the following⁸:

Your New Benefits at a Glance

At Nexeo Solutions, LLC, we remain committed to providing the coverage and support necessary to protect the health and overall well-being of our employees and their families,

Medical Coverage

- Anthem HSA 1500 with optional Health Savings Account (HSA)
- HSA- If you enroll in the HSA 1500 medical plan, you can establish an HSA and contribute pre-tax pay to build savings for future health care costs, including retiree health care costs
- Healthy Rewards - Nexeo Solutions adds to your HSA If you participate in the Healthy Rewards program. You can earn up to \$850 in Healthy Rewards from Nexeo Solutions (up to \$1,700 for you and your covered spouse or domestic partner) when you complete certain requirements (Note: You will be eligible to receive Healthy Rewards to the extent you have not already earned them at Ashland)

Flexible Spending Accounts (FSA)

- Health Care FSA
- DependentCare FSA (day care for your dependents while you work)

Dental Coverage

- Basic Dental Plan
- Enhanced Dental Plan

Vision Coverage

- EyeMed Vision Cost-Assistance Plan

Life Insurance

- The company provides coverage for you of in the amount of two times pay (\$500,000 maximum)
- Buy supplemental coverage for you up to eight times pay (\$1,200,000 maximum)

⁸ A slightly different version was sent to employees with more than 10 years service.

- Buy coverage for your spouse or domestic partner up to \$100,000
- Buy coverage for your child(ren) up to \$10,000

Basic and Voluntary Accidental Death & Dismemberment (AD&D) Insurance

- The company provides coverage for you in the amount of two times pay (\$500,000 maximum)

- Buy additional coverage up to \$500,000 (maximum of 10 times pay)

- Buy coverage for you and your family

Long-Term Disability (LTD) coverage

- The company covers you for 50% of pay

- Buy supplemental LTD coverage to cover an additional 10%

Vacation pay

- The vacation policy will be identical to the current Ashland policy

- Buy or sell up to 5 vacation days

- Initial Nexeo Solutions account balances will match what you had at Ashland*

Sick pay

- The sick pay policy will be identical to the current Ashland policy Initial Nexeo Solutions account balances will match what you had at Ashland*

Holidays

- The holiday policy will be identical to the current Ashland policy.

- Initial Nexeo Solutions floating holiday account balances will match what you had at Ashland* "

Adoption Assistance Program

- Nexeo Solutions will provide the same level of benefit as Ashland's current adoption assistance program

Additional benefit options

- Auto and home Insurance will be available

Retirement

- Matching contributions of \$1 for each \$1 you contribute to the Employee Savings Plan up to 4% of pay- company contributions begin after one year of service**

- Company Performance Contribution up to 4% of pay annually

Company Contribution to the Employee Savings Plan based on age as of the first day of the plan year:

Age each year	Contribution
<45 years	5.0%
45- 54 years	10.0%
55+ years	15.0%

If you have questions about your benefits or need additional information, don't hesitate to contact the HR Service Center at ...

This is a summary of the benefits currently offered by Nexeo Solutions. You will be eligible to participate in these benefits on the first day of your employment.

Initial Nexeo Solutions account balances will match what you had at Ashland at the time your employment with Ashland ends.

*** - Nexeo Solutions will credit your service with Ashland for this program.**

All of the employees signed and returned the letters to Nexeo. However, upon advice of Local 705, they added the words "under protest" next to their signatures. Later, after discussions between Local 705 and Nexeo, the employees again signed the letters, this time without adding anything more to them

On February 23 Local 705 sent Nexeo a message demanding recognition, reiterating its position that Nexeo could not unilaterally eliminate the Local 705 pension and health insurance plans: Local 705 also again requested that the summary plan documents be provided prior to their next meeting, then set for March 23. On March 2 Nexeo replied with a detailed description of why it felt it could unilaterally implement initial terms and conditions of employment. The

reply also stated, “This explanation also captures the reason why we have not responded to the information requests contained in your letter.” On March 7 Local 705 replied with its position and again requested the information. On March 12 Hollinshead informed Messino:

5 I know you have requested and I am pushing to have a draft SPD on the new 401(k) plan fairly soon. Our challenge is this is a brand new plan with very unique matching components and is not one we can just replicate similar to Ashland. I have mentioned before that we had PwC (PricewaterhouseCoopers, LLP) prepare some estimates on how the employees might fare switching from [Local 705’s plan] to our 401(k) plan. To that
10 end I am enclosing what is referenced as 705 Heatmaps for your review.

The parties met on March 23; at that time Nexeo had not yet given Local 705 the information it had requested concerning the 401(k) and health insurance plans. Present at this meeting for Local 705, among others, were Allison and Messino. Present for Nexeo were
15 Hollinshead, Brockson, David Kadela, attorney, and Tony Kuk, Nexeo’s and formerly Ashland’s plant manager. Local 705 gave Nexeo a written analysis of what the employees lose under if they were switched to Nexeo’s retirement plan. Local 705 also explained how employees could lose retiree health insurance coverage. In response Nexeo again reassured Local 705 that it would make employees whole for any loss by writing them a check for the shortfall and place the
20 money in the 401(k) fund for the employee. Nexeo expressed concerns about potential withdrawal liabilities if it accepted the Local 705 pension plan but Local 705 argued that under the terms of the purchase agreement Ashland was obligated to bear those costs. At this meeting the parties also exchange initial contract proposals; each used the old Local 705 –Ashland contract as a template. Significantly, neither party proposed any changes to those provisions
25 concerning overtime pay, daily and weekly guarantees of pay, and vacation pay concerning employees receiving 50 hours of pay for each taken vacation week. The parties agreed to review the proposed contracts, talk by conference call on March 28 and then meet again on March 31.

Prior to the conference call Nexeo sent Local 705 a revised estimate concerning how the
30 employees would fare under its retirement plan as opposed to Local 705’s plan. Later Nexeo sent Local 705 a revised contract proposal. The revised proposal, among other things, gave Local 705 two options to choose from:

- (a) Option 1: Nexeo Benefit Plans and Policies
- 35 (b) Option 2: Nexeo healthcare (medical, dental, vision and flexible spending) and Retirement Plans, and existing vacation, sick pay, funeral leave and jury duty entitlements, as provided in the Union’s expired collective bargaining agreement with Ashland.

40 On March 28 Nexeo and Local 705 had the planned conference call. They reviewed the proposals and reached some tentative agreements, mostly in provisions for which neither party had suggested changes. They did not review pension or health insurance, leaving that for their meeting on March 31. After the conference call Hollinshead called Messino. During the course of that conversation Hollinshead raised the retirement issue and said that he was no longer
45 authorized to state the Nexeo would make the employees whole for any losses they would suffer by converting to Nexeo’s plan but that he could do something to get the number “closer.”

The parties met again on March 31. They reviewed the tentative agreements that were made during the earlier conference call. There was also some discussion of other provisions such as subcontracting and transfers. But Messino stated that because he still did not have the SPD for the Nexeo's health insurance plan he really could not discuss how it compared to Local 705's plan. Hollinshead relied that he would get that document for Local 705 and indicated that Nexeo's main concern was the retirement plan and that Nexeo could look into Local 705's health insurance plan and that he felt it was an issue that they could resolve. Hollinshead then announced that at midnight Nexeo was going to place the employees under its retirement and health insurance plans and remove them from Local 705's plans. Messino asked whether Nexeo felt that negotiations were at impasse and Hollinshead conceded that they were not, but asserted that Nexeo had the right to unilaterally set initial terms for the employees. Messino stated his disagreement and said that Local 705 still needed the plans documents from Nexeo.⁹

Nexeo admits that on April 1 it did not make contributions to the Local 705's Health and Welfare fund but instead moved its employees to Nexeo's health insurance plan. Nexeo also admits that on April 1 it did not make contributions to the International Brotherhood of Teamsters Local 705 Pension Fund and moved employees to Nexeo's 401(k) plan. In addition, on April 1 Tony Kuk, Nexeo's plant manager, announced to the employees that they would no longer receive a daily guarantee of 8 hours pay for each workday and a weekly guarantee of 40 hours pay for each workweek. He also changed the existing overtime policy by telling employees that they would only receive overtime pay after working 40 hours per week instead of receiving overtime pay after working 8 hours per day. Finally, he told employees that they would no longer receive 50 hours pay for each vacation taken but would instead receive only 40 hours pay. Nexeo stipulated that it actually made the last two announced changes. As to the first, in March 2012, an employee was sent home early but apparently was not paid his 8 hours; this is the only time this issue has arisen since the April 1 announcement.

The parties were scheduled to resume bargaining on June 1. On May 25 Messino sent Hollinshead a message requesting "a copy of the 401(k) plan document." The next day Hollinshead replied, indicating that the "summary plan description document is still not finalized" and that "it might take a while for the SPD on the 401(k)." On June 2 Messino again requested a copy of "the 401(k) document" and Hollinshead replied that same day that:

Fidelity is providing the draft SPD to [Nexeo] next week. Once legal and HR have reviewed and approved it, it should be ready in the next few weeks. I will provide as soon as it is available.

On June 4 Messino explained that Local 705 was requesting both the summary plan description of Nexeo's 401(k) plan and the 401(k) plan that Nexeo was required to have under Section 402(a)(1) of ERISA. Obviously, until that point Hollinshead felt that Local 705 had only been asking again for the SPD and not something new. On July 15 after it was finally completed and reviewed, Nexeo gave Local 705 a copy the summary plan description for Nexeo's 401(k) plan. On August 11 Nexeo gave Local 705 a copy of the ERISA plan document for the 401(k) plan.

⁹ The foregoing facts are based on documentary evidence and a composite of the credible testimony of Messino and Hollinshead. To the extent that there were differences in their testimony, I have credited Messino's testimony; his demeanor was convincing, his recollection sharp, and overall he seemed in command of what happened during the meetings and conversations.

And it was not until October 19 that Nexeo gave Local 705 a copy the summary plan description for Nexeo's health insurance plan.

C. Fairfield, California

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The complaint alleges that Nexeo violated Section 8(a)(5) by:

- No longer providing coverage of the unit employees under Local 70's pension plan but instead placing them under Nexeo's retirement plan.
- 10 • No longer covering employees under Local 705's health and welfare fund but instead placing them in Nexeo's health insurance plan.
- Abandoning the practice of using seniority to assign driving routes.
- Abandoning the practices of using seniority to allocate unpaid lay-off days.

15

Local 70 has represented a unit of employees¹⁰ at Ashland's distribution center located in Fairfield, California, for about 18 years; at the time of the hearing there were about 20 employees in this unit. Employees were covered Local 70's Western Conference of Teamsters Pension Trust that provided employees with defined benefits upon retirement. In general, that plan allowed employees to retire at any age and receive full benefits when an employee's years of service added to the employee's age amounted to 80. This plan was funded entirely by employer contributions; employees made no contribution to the plan.

20

On February 16 Nexeo met with Local 70. Present for Nexeo were Paul Fusco, Nexeo's human resources business partner senior and former Ashland human resources business partner, 25 Jack Brewer, regional manager, and David Kadela, attorney. Present for Local 70 were Robert Aiello, business agent, and Dominic Chiovare, Local 70 president. During the meeting Nexeo stated it intent to offer all the unit employees employment at their current positions and at the same base salary. Nexeo then showed Local 70 a copy of a generic offer of employment letter that it intended to send the employees; it was identical to the offer letter that Nexeo had given to 30 Local 705 a day earlier. Nexeo explained that after a majority of employees accepted the offer Nexeo would then recognize Local 70. Nexeo went on to explain that the employees would be covered by a Nexeo health plan and retirement plan instead of the Local 70 plans that they had under Ashland. The next day Nexeo sent all the unit employees the letter; the employees then accepted the offers and on February 26 Nexeo recognized Local 70.

35

The parties met for bargaining on March 22. Walt Penz, senior administrator for the Western Conference of Teamsters Pension Trust, joined Aiello and Chiovare for Local 70; Fusco and Brewer were present for Nexeo. Nexeo and Local 70 exchanged contract proposals; both used the old Local 70/Ashland contract as a template. Discussion quickly focused on the pension 40 issue. Local 70 explained its Western Conference of Teamsters Pension Trust and Nexeo explained its 401(k) plan. Nexeo gave Local 70 its comparison of the plans and how it proposed

¹⁰ That unit is:

Warehouse leads, drivers, drivers/material handlers and material handlers employed by the Employer at its plant located at 2461 Crocker Circle and its leased warehouse space located at 2200 Huntington Road, Suite A in Fairfield, California; but excluding all other employees, including all sales personnel, office clerical employees, professional employees, technical employees, guards and supervisors, as defined in or under the National Labor Relations Act.

to make up the difference to employees for the shortcomings of its plan. The parties met again the next day; Ernie Carrion, shop steward, replaced Benz for Local 70. They reached tentative agreements on some noneconomic issues.

5 Nexeo and Local 70 met again on March 29. They continued their review of noneconomic terms of the contract proposals. After that Local 70 gave Nexeo a revised economic proposal that included a health and welfare plan different from the one set forth in latest Ashland contract. The parties discussed economics. Either at the bargaining session that day or via email the next day Nexeo made a wage proposal. At some point during the meeting
10 Local 70 gave Nexeo a letter indicating that it believed Nexeo was a “perfectly clear successor” with attendant obligations. Nexeo expressed its disagreement. Nexeo announced that if there was no agreement reached by April 1 it would implement the changes set forth in the offer of employment letter. No party made any declaration of impasse.¹¹ Nexeo and Local 70 continued to exchange messages and information on March 30 and 31. On April 1 Nexeo began covering
15 the unit employees under its 401(k) retirement plan and did not make payments to Local 70’s Western Conference of Teamsters Pension Trust; it also began covering employees under its own health insurance plan and not under Local 70’s health insurance fund.

On April 4¹² Nexeo assigned routes to drivers based on the same seniority-based systems
20 that had been used by Ashland. More specifically, drivers were called in order of seniority and informed of the routes that were available the next day. The most senior driver selected his preferred route, then the next senior driver selected from the remaining routes and so on. This allowed the more senior drivers the flexibility of selecting routes with less heavy traffic and fewer stops; it also allowed those drivers to select longer routes in the hope of earning overtime
25 and conversely to select a shorter route on a given day so as to get home earlier for personal reasons. Nexeo never informed Local 70 of its intent to change this practice. However, beginning on April 5, Nexeo no longer allowed the drivers to select their routes in order of seniority; rather Nexeo assigned employees to drive routes based on its own perceptions of efficiency. Discussions ensued between Nexeo and Local 70 concerning this change, and in mid
30 May Nexeo restored the seniority based route selection practice that had previously existed.

Under Ashland, if there was not enough driving work for the drivers then the least senior driver was given the option of performing warehouse work for the day. Driver Gary Robbins was advised that he would not work on April 21 because there was not route for him. He was
35 not the least senior driver nor was he allowed to perform warehouse work. Similarly, driver Ernie Carrion was advised that he would not work on April 22 because there was no route for him; he was not given the option to work in the warehouse and was not paid for that day. Local 70 raised these changes with Nexeo as part of the discussions about the route assignment change

¹¹ In its brief Nexeo argues:

The main obstacle that prevented an agreement was each side’s insistence that the other agree to the retirement plan it had proposed – the Company maintained that it had to have its 401(k) plan, while the Union insisted that it had to have the union-sponsored plan.

In doing so Nexeo relies on Fusco’s testimony. However, I do not credit that testimony. As the record indicates it seemed that Fusco was blending in his subjective feelings with what actually occurred and his testimony was given in response to leading questions; his demeanor was not convincing.

¹² Nexeo informed the employees that they would have Friday, April 1, off with pay as it transitioned to operate the facility.

described in the preceding paragraph. As with that issue, in mid-May restored the practice to what it had been under Ashland.

The parties continued to bargain after Nexeo made the changes to the working conditions of the employees. Nexeo's October 17 proposal was presented to union members for a vote and they unanimously rejected it.

D. Analysis

This case involves a close question of whether Nexeo is a perfectly clear successor to Ashland and thus was required to bargain first before setting initial terms of employment. In *Burns*, supra, the Supreme Court held that a successor employer may unilaterally set initial terms and conditions of employment even if the employees are representative by a union. The Court indicated, however:

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which case it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. *Id.*, at 294-95.

The General Counsel's first argument is that Nexeo became a perfectly clear successor by virtue of the terms of the APS; I alert the reader that this argument largely ignores the Board's decision in *Spruce-Up Corp.*, 209 NLRB 194 (1974), *enfd.* 529 F.2d 516 (4th Cir. 1975); Rather, it largely focuses on the language used by the Supreme Court in *Burns* and not on the gloss put on that language by the Board in *Spruce Up*. I walk through this first argument and give my conclusions as I go. First I agree with the General Counsel that it was perfectly clear (as a matter of fact and not as a legal conclusion) that Nexeo planned to retain all the employees in both units. Nexeo committed itself to do so in the APS; that document repeatedly indicated that Nexeo was to make offers of employment to "all" employees.

In *Burns* the Supreme Court continued:

In other situations, however, it may not be clear until the successor has hired his full complement of employee that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit. *Id.*, at 294-95.

I conclude that this case does not involve such a situation. Nexeo was obligated not only to offer employment to all the unit employees; it also had to offer the employees employment in their same position, with the same base wages, and with a comparable benefit package. There was little doubt that a majority, if not all, of the employees, would under these conditions accept employment at Nexeo. This was what those provisions in the APS were designed to accomplish. This is what Nexeo understood would happen. This is what Local 705 and Local 70 understood would happen. And this is exactly what happened. Stated differently, Nexeo:

[E]xpressed its clear intention to staff the facilities with the predecessor's employees and to bargain with the employees' designated representative, thereby securing a skilled and

experienced workforce and avoiding the uncertainty of attempting to recruit new employees based unilaterally established employment terms.

Road & Rail Services., 348 NLRB 1160, 1160 (2006).

But Nexeo relies on, and the General Counsel ignores in his first argument, *Spruce Up*. In *Spruce Up* the Board held that the employer was free set initial terms of employment because it was not perfectly clear that it planned to hire all the predecessor's barbers. The Board described the critical fact pattern in that case as follows:

Although, at the February meeting, Fowler expressed a general willingness to hire the barbers employed by the former employer, he at the same time indicated that he was going to be paying different commission rates. Fowler thereby made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend upon their willingness to accept those terms. When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him-a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.

Id. at 195. As the quote passage indicates, it was unclear whether the barbers would accept employment under the different compensation scheme the employer was offering. I agree with Local 705's argument in its brief that the fact pattern in *Spruce Up* does not cover the fact pattern in this case. In this case Nexeo was offering employment in the same position, at the same base rate, and with comparable benefits. But the Board in *Spruce Up* went on to indicate in dicta that has since become a holding that the caveat in *Burns* should be restricted to circumstances in which the new employer has either actively or by tacit inference, misled employees into believing they would all be retain without change in their working conditions or at least in circumstances where the new employer failed to clearly announce its announcement to establish a new set of working conditions prior to making the offer of employment. *Spruce Up* therefore makes it clear that we are not to rely on the language used by the Supreme Court in *Burns* alone; rather there must be at least a finding that a successor employer misled employees into believing their working conditions would remain the same. (This is, in fact, the General Counsel's second argument and I address it below.)

To be sure, as the General Counsel and Local 705 point out, the Board has not consistently applied *Spruce Up* in the literal fashion that its language suggests. For example, in *Springfield Transit Management*, 281 NLRB 72, 78 (1986), the respondent was required to adopt the collective-bargaining agreement that its predecessor had with a union and hire all of the predecessor's employees. The successor instead made what the judge described as a:

[C]onditional offer-"we'll hire you if you will work on our terms"-is precisely the kind of ambivalence in which it was not free to engage. Having said, and been required to say, that it would hire the SSRC office staff, it was then obligated to negotiate their initial wages, hours, and terms and conditions of employment with the Union.

Id. Neither the Board nor the judge mentions *Spruce Up* and the case does not fit comfortably with the holding in *Spruce Up* that, absent some deception, successor employers may unilaterally set initial terms of employment to the predecessor's employees. Rather, they seemed to apply a common sense meaning to the words used by the Supreme Court in *Burns*. The General Counsel also cites *The Denham Co.*, 218 NLRB 30, 31 (1975), and 206 NLRB 659, 660 (1973). In that case the respondent was obligated to and informed its predecessor's employees that it would retain all of them for at least 30 days. Before hiring them the respondent unilaterally announced a reduction in pay and benefits as it set initial terms of employment for the employees. The Board simply applied the unvarnished language from *Burns*, considered the totality of the circumstances, and found that the respondent was a perfectly clear successor who could not unilaterally set initial terms of employment. Again, the decision did not turn on evidence of deception on the part of the respondent.

At the end of the day, however, these cases must be assessed against the longer list of cases, cited by Nexeo in its brief, where the Board more literally applied the gloss it upon the *Burns* "perfectly clear" language and instead allowed employers to unilaterally set initial terms absent some evidence of deception concerning those initial terms. The APS did not purport to set initial terms of employment; rather, it indicated a framework for a benefit package the details of which would be determined later. On February 15 and 16 Nexeo announced those details. I conclude that the General Counsel's first theory does not support a finding that Nexeo was obligated to bargain first concerning initial terms. Rather, it is for the Board to decide if it wishes to modify *Spruce Up* in light of the facts in this case, or whether to revisit that case entirely. I have attempted to make the necessary findings if it chooses to do so.

The General Counsel's second theory is that there was a:

[C]onsistent message streaming that served for several months to allay employees' concerns by misleading them into believing that Ashland employees would be retained with essentially no change in their terms and conditions of employment.

Therefore, the argument goes, under *Spruce Up* it became a perfectly clear successor. I reject this theory. I have concluded above that there was no misleading of employees by Nexeo or by Ashland. The totality of the messages that were conveyed to the employees and to Local 70 and Local 705, and by Local 70 and Local 705 to its members, were consistent with the terms of the APS and advised employees that details of the employment offers would follow. On February 15 and 16 Nexeo gave the Local 70 and Local 705 the promised details in the form of the extremely detailed letters fully described above. These facts serve to distinguish this case from *DuPont Dow Elastomers, LLC*, 332 NLRB 1071 (2000), enfd. 296 F.3d 495 (6th Cir. 2002), and similar cases cited by the General Counsel. In *DuPont Dow* the respondent indicated that it would retain all the employees with the same terms and conditions of employment; it only announced changes after it had made those promises and had begun the hiring process. The General Counsel is correct that had Nexeo told employees that they would receive benefits that were "substantially equivalent" or "comparable" without a more detailed explanation, it could

have been a perfectly clear successor because it would not have sufficiently advised employees of the details of their initial terms. *Elf Atochem North America*, 339 NLRB 796, 796, 808 (2003). But here Nexeo did, in a timely fashion, provide the employees with specific details concerning the initial terms.

Local 705 and the General Counsel argue that Nexeo “misled” employees and the Union into believing that they would receive a benefit package that would be comparable in the aggregate but then were offered initial terms that were not comparable in the aggregate. But they rely only on the differences in the retirement and health insurance plans. There record does not allow me to make any assessment as to whether the benefit packages, in their entirety, were comparable in the aggregate. Nor could I comfortably make such an assessment even if the record was fully developed and substitute my judgment for that of Nexeo or Ashland, the parties who made that agreement.

I conclude that the General Counsel has not established that Nexeo was obligated to first bargain with Local 705 or Local 70 before it offered employment upon terms it set forth in the offer of employment letters. It follows that I dismiss the allegations in the complaint that Nexeo unlawfully moved the employees from the existing retirement and health insurance plans to its plans.

The remaining issues may be resolved in a more summary manner. Nexeo admits that it is a successor employer to Ashland and that it had an obligation to recognize and bargain with Local 70 and Local 705 after a majority of unit employees accepted employment. Concerning the Willow Springs facility the complaint alleges that Nexeo eliminated the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and reduced employees’ vacation pay from 50 hours to 40 hours for each week of vacation taken. I have concluded above that Nexeo did so, and did so without first giving notice to Local 705 so as to allow it an opportunity to bargain over those matters. This is unlawful. *NLRB v. Katz*, 369 U.S. 736 (1962). Nexeo does not offer a defense to this conduct in its brief. I note that these changes were not contained in the offer of employment letters and therefore were not part of lawful action taken by Nexeo in setting the initial terms of employment. By unilaterally eliminating the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and by reducing employees’ vacation pay from 50 hours to 40 hours for each week of vacation taken, Nexeo violated Section 8(a)(5) and (1). At the Fairfield, California, Nexeo abandoned the practice of using seniority to assign driving routes and abandoned the practices of using seniority to allocate unpaid lay-off days. This was done without first giving Local 70 notice and an opportunity to bargain about the changes. By unilaterally abandoning the practice of using seniority to assign driving routes and abandoning the practice of using seniority to allocate unpaid lay-off days, Nexeo violated Section 8(a)(5) and (1). Finally, there are the allegations concerning the information requests made by Local 705. An employer must supply a union with requested information that is relevant and useful for the union to fulfill its obligations to represent the unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). An employer violates the Act when it unreasonably delays providing a union with such information. *Consolidated Coal Co.*, 307 NLRB 69 (1992). Three items of information are at issue. First, on February 15 Local 705 requested a copy of the summary plan document for Nexeo’s 401(k) plan and it repeated its request periodically thereafter. Nexeo did not provide the information until July 15. However, the evidence shows that during that time Nexeo was in the process of creating that document. Nexeo explained to Local 705 that it was

having difficulty creating the document because it was attempting to match the benefits as best as it could to those of under Local 705's pension plan. And there is no evidence that Nexeo dragged its feet in preparing that document in order to delay giving it to the Local 705. I dismiss this allegation of the complaint. Next, on February 15 Local 705 requested a copy of the summary plan document for Nexeo's health insurance plan. Nexeo did not give this to Local 705 until October 19, 2011. Nexeo argues that it was not required to give this document to Local 705 until April 1, but it promised to recognize Local 705 at the February 15 meeting and did so shortly thereafter. Nexeo tries coming at it from the other end, arguing that because Local 705 decided to suspend bargaining after June 1, Nexeo's obligation to provide the document was likewise suspended. But Local 705 remained the bargain representative of the employees and the information is the type that is clearly relevant to allow it to function in its representative capacity whether or not there are ongoing negotiations. In other words there is no excuse for such a lengthy delay. By unreasonably delaying providing Local 705 with a copy of the summary plan document describing its health insurance plan, Nexeo violated Section 8(a)(5) and (1). Finally, on May 25 Local 705 requested a copy of the plan document required by ERISA for its 401(k) plan; Nexeo did not give this document to Local 705 until August 11. In this case there was some understandable confusion initially that Local 705 was requesting something other than the summary plan document. But after a week or so this should have become clear to Nexeo. By unreasonably delaying providing Local 705 with a copy of the plan document for its 401(k) plan, Nexeo again violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act by

1. Eliminating the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and by reducing employees' vacation pay from 50 hours to 40 hours for each week of vacation taken without first giving notice to Local 705 and allowing it an opportunity to bargain over those matters.

2. Abandoning the practice of using seniority to assign driving routes and abandoning the practice of using seniority to allocate unpaid lay-off days without first giving notice to Local 70 and allowing it an opportunity to bargain over those matters.

3. By unreasonably delaying providing Local 705 with copies of the summary plan document describing its health insurance plan and the plan document for its 401(k) plan.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall require Respondent at its Willow Springs, Illinois facility to restore the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and resume giving employees vacation pay of 50 hours for each week of vacation taken. I shall require Respondent at its Fairfield, California facility to restore the practice of using seniority to assign driving routes and to restore the practice of using seniority to allocate unpaid lay-off days, to the extent that it has not already done so.

I shall require that Respondent to make employees whole for any losses suffered as a result of its unlawful conduct. Backpay shall be computed with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.¹³

ORDER

The Respondent, Nexeo Solutions, LLC, Willow Springs, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Eliminating the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and by reducing employees' vacation pay from 50 to 40 hours for each week of vacation taken without first giving notice to Local 705 and allowing it an opportunity to bargain over those matters.

(b) Unreasonably delaying providing Local 705 with copies of the summary plan document describing its health insurance plan and the plan document for its 401(k) plan.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

The Respondent, Nexeo Solutions, LLC, Fairfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Abandoning the practice of using seniority to assign driving routes and abandoning the practice of using seniority to allocate unpaid lay-off days without first giving notice to Local 70 and allowing it an opportunity to bargain over those matters.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. The Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) At its Willow Springs, Illinois facility, restore the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and resume giving employees vacation pay of 50 hours for each week of vacation taken.

5 (b) At its Fairfield, California facility, restore the practice of using seniority to assign driving routes and to restore the practice of using seniority to allocate unpaid lay-off days, to the extent that it has not already done so.

(c) Make employees whole for any loss of earnings and other benefits suffered as a result of the unlawful conduct in the manner set forth in the remedy section of the decision.

10 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

15 (e) Within 14 days after service by the Region, post at its facility in Willow Springs, Illinois, copies of the attached notice marked “Appendix A.” and post at its facility in Fairfield, California, copies of the attached notice marked “Appendix B.”¹⁴ Copies of the notices, on forms provided by the Regional Director after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in
20 conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by
25 any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2011, pertaining to Appendix A, and since April 5, 2011, pertaining to Appendix B.

30 (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

5 Dated, Washington, D.C. August 30, 2012

10

William G. Kocol
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT eliminate the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and reduce employees' vacation pay from 50 hours to 40 hours for each week of vacation taken without first giving notice to the Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, an affiliate of the International Brotherhood of Teamsters and allowing it an opportunity to bargain over those matters..

WE WILL NOT unreasonably delay providing Local 705 with requested information that is relevant and necessary for Local 705 to perform its functions as the bargaining agent for the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the guarantees employees previously had of 8 hours pay for each day worked and 40 hours pay for each week worked, and resume giving employees vacation pay of 50 hours for each week of vacation taken.

WE WILL make employees whole for any loss of earnings and other benefits resulting from our unlawful conduct plus interest compounded daily.

Nexeo Solutions, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

209 South LaSalle Street, 9th Floor
Chicago, Illinois 60604
Hours: 8:30 a.m. to 5 p.m.
312-353-7570.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 312-353-7170.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT abandon the practice of using seniority to assign driving routes and abandon the practice of using seniority to allocate unpaid lay-off days without first giving notice to the Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, affiliated with the International Brotherhood of Teamsters and allowing it an opportunity to bargain over those matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the practice of using seniority to assign driving routes and to restore the practice of using seniority to allocate unpaid lay-off days, to the extent that we have not already done so.

WE WILL make employees whole for any loss of earnings and other benefits resulting from our unlawful conduct plus interest compounded daily.

Nexeo Solutions, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400
San Francisco, California 94103-1735
Hours: 8:30 a.m. to 5 p.m.
415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.